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No. 09-

IN THE

Supreme Court of the United States

TRAVIS SAULSBERRY and LORETTA JAMES,
in their individual and official capacities,

Petitioners,

v.

LORRI MYERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the circuit courts that require reasonable suspicion prior to strip searches of pretrial detainees in a jail have contradicted this Court's longstanding precedent stated in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), that probable cause is not required to conduct strip searches which further the overwhelmingly important interests of jail security and safety.

Whether the law surrounding visual, non-body cavity searches of jail detainees was sufficiently settled to be considered "clearly established" at the relevant time, when a split exists among the circuits' interpretation of this Court's precedent and a large number of the circuits set precedents that conflict with this Court's decision in *Bell v. Wolfish*.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	3
1. Factual Background	3
2. Procedural Background	4
SUMMARY OF THE ARGUMENT	6
REASONS FOR GRANTING THE PETITION	7
I. THE CIRCUIT COURTS' DIVERGENCE FROM *BELL* AND THE RESULTING LACK OF CLARITY IN THE LAW	7

Contents

Page

A. *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) .. 7

B. The Divergence of the Circuit Courts from *Bell* 10

II. THE LAW REGARDING STRIP SEARCHES OF PRETRIAL DETAINEES WAS NOT CLEARLY ESTABLISHED AT THE TIME THE STRIP SEARCH OCCURRED IN THIS CASE. 19

III. BECAUSE THE LAW APPLICABLE TO THIS CASE WAS FAR FROM "CLEARLY ESTABLISHED" AND BECAUSE SAULS-BERRY AND JAMES' ACTIONS COMPLIED WITH THIS COURT'S PRECEDENT IN *BELL*, SAULSBERRY AND JAMES ARE ENTITLED TO QUALIFIED IMMUNITY. 22

CONCLUSION 27

TABLE OF APPENDICES

Page

Appendix A — Opinion And Order Of The United States District Court For The Eastern District Of Oklahoma Filed January 12, 2009 ..... 1a

Appendix B — Order And Judgment Of The United States Court Of Appeals For The Tenth Circuit Filed July 16, 2009 ..... 22a

TABLE OF CITED AUTHORITIES

Page

CASES:

Archuleta v. Wagner, 523 F.3d 1278 (10th Cir. 2008) 11

Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ..... *passim*

Bull v. City & County of San Francisco, 539 F.3d 1193 (9th Cir. 2008) 11, 17, 18, 22

Cottrell v. Kaysville City, Utah, 994 F.2d 730 (10th Cir. 1993) 11

Florence v. Bd. of Chosen Freeholders of County of Burlington, 595 F. Supp. 2d 492 (D.N.J. 2009), *order amended by Florence v. Bd. of Chosen Freeholders of County of Burlington*, __ F. Supp. 2d __, 2009 WL 1971328 (D.N.J. June 30, 2009) 16, 17, 21

Fuller v. M.G. Jewelry, 950 F.2d 1437 (9th Cir. 1991) 11

Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) 20

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) 19

Cited Authorities

	Page
Hill v. Bogans, 735 F.2d 391 (10th Cir. 1984) ...	11
Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)	20
Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985) ...	11
Kelsey v. County of Schoharie, 567 F.3d 54 (2d Cir. 2009)	10
Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981) ...	11
Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983)	11
Mitchell v. Maynard, 80 F.3d 1433 (10th Cir. 1996)	25
Pearson v. Callahan, __ U.S. __, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)	19, 20, 21, 22, 26
Powell v. Barrett, 541 F.3d 1298 (11th Cir. 2008)	*passim*
Serna v. Goodno, 567 F.3d 944 (8th Cir. 2009) ..	21
Stanley v. Henson, 337 F.3d 961 (7th Cir. 2003)	16
Weber v. Dell, 804 F.2d 796 (2d Cir. 1986)	11

Cited Authorities

Page

Wilson v. Layne, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) 20, 21, 22

Wood v. Hancock County Sheriff's Dep't, 354 F.3d 57 (1st Cir. 2003) 10, 11

CONSTITUTION:

U.S. CONST, amend. IV ..... *passim*

U.S. CONST. amend. XIV, § 1 ..... 1, 4, 5

STATUTES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

42 U.S.C. § 1983 ..... 2, 3, 4, 25

OPINION BELOW

The opinion of the Court of Appeals is unreported and is set out at pages 1a-8a of the Appendix to the Petition for Writ of Certiorari ("Pet. App."). The District Court's opinion is unreported and is set out at pages 10a-27a in the Pet. App.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on July 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST, amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. XIV, § 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case presents an opportunity for the Court to review the manner in which some circuit courts, including the United States Tenth Circuit Court of Appeals, have departed from this Court's decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), and to remedy the split which has occurred among the circuits regarding the standard required to perform a strip search of a pretrial detainee being booked into a jail. The case also presents an opportunity for this Court to review the clarity of the law on this issue in the context of a qualified immunity analysis.

This case arises out of Respondent Lorri Myers' ("Myers") brief incarceration in the LeFlore County Detention Center in Poteau, Oklahoma following her arrest for Public Intoxication. Myers filed this lawsuit under 42 U.S.C. § 1983, alleging violations of her constitutional rights, including a claim that Petitioners Travis Saulsberry ("Saulsberry") and Loretta James ("James") violated her Fourth and Fourteenth Amendment rights when she allegedly was strip searched. The basis for the district court's jurisdiction was 28 U.S.C. § 1331.

1. Factual Background

On August 31, 2006, police officers stopped Lorri Myers ("Myers") and her husband at a traffic checkpoint in Pocola, Oklahoma. Myers was arrested for public intoxication and was processed into the LeFlore County Detention Center ("LCDC") in the early morning hours of September 1, 2006. James, a female jailer, processed

Myers. Saulsberry was the Jail Administrator. However, he was not even present at the facility during the time of the events at issue.

Pursuant to the jail's routine booking procedure, James, a female employee, escorted Myers into the shower room and, according to Myers account of the incident, had Myers remove her clothing, visually inspected Myers without performing a body cavity search and then Myers showered and dressed in jail-issued clothing. Myers concedes that James was the only officer involved during the procedure. This process was performed in private. Myers was subsequently placed in a detoxification cell for approximately four hours and then released on bail.

2. Procedural Background

Myers filed a § 1983 lawsuit alleging that the events of August 31 – September 1, 2006, including the clothing exchange and strip search, violated her Fourth and Fourteenth Amendment rights. The Petitioners filed Motions for Summary Judgment based, in part, on qualified immunity. Saulsberry and James argued their conduct did not violate clearly established constitutional rights of which a reasonable person in their positions would have known. As they argued in both the district court and the Tenth Circuit Court of Appeals, the Tenth Circuit's precedent, requiring reasonable suspicion to conduct a visual strip search of a pretrial detainee being booked into a jail, contradicts this Court's precedent set forth in *Bell*, 441 U.S. 520, and a split in the circuits has developed regarding the standard required for such

a strip search. Therefore, as the law regarding visual strip searches of pretrial detainees is far from being "clearly established."

The district court granted Saulsberry and James' Motions for Summary Judgment in part, but denied summary judgment on the claim that the alleged strip search violated Myers' Fourth Amendment rights. Instead of evaluating whether Saulsberry and James were entitled to qualified immunity based on Myers' version of the facts, the district court found that Saulsberry and James were not entitled to qualified immunity regarding that claim because "unresolved factual issues" exist. On appeal, the Tenth Circuit affirmed the district court's decision, stating that the circuit's law concerning strip searches was clearly established at the time of the search. However, the order and opinion did not address the circuit's deviation from this Court's longstanding strip search precedent which did not require probable cause and did not expressly require reasonable suspicion when the searches of pretrial detainees are conducted for the important interests of jail safety and security. *Bell*, 441 U.S. at 520.

Furthermore, the Tenth Circuit found that Jail Administrator Saulsberry was not entitled to qualified immunity against the claims based on the alleged failure to train and supervise jailer James and based on allegedly unconstitutional policies; however, these claims were necessarily dependent upon a finding that the law surrounding visual strip searches was clearly established and that the visual search James performed violated the clearly established law. As Saulsberry and James demonstrated in the district court, James received

substantial training which guided her to act in compliance with constitutional law and in accordance with the jail's procedures; these procedures upheld inmates' constitutional rights and did not violate clearly established law. Because Saulsberry and James demonstrated the law regarding this type of search was far from clearly established and that James' actions did not violate clearly established law, both Saulsberry and James are entitled to qualified immunity.

SUMMARY OF THE ARGUMENT

This case presents exceptionally important questions of federal law on which this Court has provided guidance; unfortunately, the circuits (including the Tenth Circuit) have strayed from this Court's guidance and are now in conflict with the precedent set in *Bell*. The foundational question in this case is whether constitutional principles require reasonable suspicion for the visual, non-body cavity strip search of a pretrial detainee who is being processed into a jail facility. A second question is whether the law surrounding visual, non-body cavity strip searches of jail detainees was sufficiently settled to be considered "clearly established" at the relevant time, September 1, 2006. Finally, if the law was not clearly established at that time, then the jailer who performed the visual, non-invasive strip search and the jail administrator, who was not even present at the facility during the time of the search, are entitled to qualified immunity.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUIT COURTS' DIVERGENCE FROM *BELL* AND THE RESULTING LACK OF CLARITY IN THE LAW.

Based on the opinions of the circuit courts since the time this Court considered the constitutionality of policies permitting strip searches of pretrial detainees, it is clear that the law surrounding this issue is anything but clearly established. One recent opinion from the Eleventh Circuit specifically pointed out the extent to which numerous opinions from the various circuit courts have diverged from the principles this Court established in the seminal case of *Bell*.

A. *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)

In *Bell*, pretrial detainees challenged the constitutionality of Metropolitan Correctional Center's practice of conducting visual body-cavity searches of all[1] inmates following contact visits. This Court ultimately upheld the constitutionality of such searches, even absent probable cause.

In *Bell*, the record established that all inmates in the New York City federal facility (regardless of the

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1. Some inmates housed in the detention facility were charged with no wrongdoing and were merely being held as witnesses in protective custody. *Bell*, 441 U.S. at 524. Even these inmates were subjected to the invasive body cavity searches. *Bell*, 441 U.S. at 558.

reason for their detention) were required to expose their body cavities for visual inspection as part of a strip search conducted after every contact visit with a person from outside the institution. *Bell*, 441 U.S. at 558. The invasive visual body cavity searches conducted in *Bell* were not always performed in private; as Justice Marshall noted in his dissenting opinion, "as the Court neglects to note, because of time pressures, this humiliating spectacle is frequently conducted in the presence of other inmates." *Bell*, 441 U.S. at 577 (Marshall, J., dissenting). In addition to the body cavity searches, inmates were required "to disrobe, to have their clothing inspected, and to present open hands and arms to reveal the absence of any concealed objects." *Bell*, 441 U.S. at 595 (Stevens, J., dissenting). Corrections officials asserted that visual cavity searches were necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution. *Id.*

In *Bell*, this Court balanced the need for the search against the degree of invasion and considered "the scope of the particular intrusion, the manner in which it [was] conducted, the justification for initiating it, and the place in which it [was] conducted." *Bell*, 441 U.S. at 559. This Court further noted that "[a] detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented . . . ." *Bell*, 441 U.S. at 559. After considering these factors, this Court concluded that, under the circumstances, the very invasive visual inspection of body cavities, absent

probable cause, was not unreasonable pursuant to the Fourth Amendment. *Bell*, 441 U.S. at 558-59.

Notably, although Justice Stevens (joined by Justice Brennan) dissented from the Court's Opinion upholding visual body cavity searches, he agreed that it was acceptable to perform the additional strip search consisting of requiring the inmates to disrobe, have their clothing inspected, and present open hands and arms to reveal the absence of any concealed objects as described in his dissent. *Bell*, 441 U.S. at 595 (Stevens, J., dissenting). This additional search which Justice Stevens described and agreed was acceptable was much more similar in nature to the strip search that occurred in the instant case than the body cavity search upheld in *Bell*.

This Court's longstanding precedent stated in *Bell* established that even visual body cavity inspections of pretrial detainees without probable cause may be constitutional. *Bell*, 441 U.S. at 558. This Court determined that valid and important interests support the need for strip searches. *Bell*, 441 U.S. at 559-60. It further determined that prison and jail officials must be entitled to great deference in determining the need for security-related measures such as strip searches. *Bell*, 441 U.S. at 547. *Bell* was valid and binding law at the time of the relevant events in 2006 and remains valid and binding law. *See, Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008) ("[u]ntil the Supreme Court tells [courts] that the *Bell* approach no longer applies where that Court applied it, [courts] are inclined to continue using it.").

B. The Divergence of the Circuit Courts from *Bell*.

In the years since this Court examined the issue regarding strip searches of pretrial detainees in *Bell*, the circuit courts have taken diverging paths when applying *Bell*'s precedent to numerous variations of strip search fact patterns. In *Bell*, this Court stated, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Bell*, 441 U.S. at 559. In fact, as discussed more thoroughly *infra* Part I.B., Justice Powell specified that he was dissenting, in part, from the Court's Opinion in *Bell* solely on the basis that the Court had not required reasonable suspicion. *Bell*, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part). Yet, the Tenth Circuit and other circuits have done exactly what this Court cautioned against – they have attempted to apply a precise definition or mechanical approach with the reasonable suspicion test.

Although this Court upheld even invasive body cavity searches of detainees without requiring probable cause for the searches and without expressly requiring reasonable suspicion, several circuits have required reasonable suspicion prior to even less invasive strip searches.[2] Some have focused, in part, on whether the

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2. *See, Wood v. Hancock County Sheriff's Dep't*, 354 F.3d 57, 62 (1st Cir. 2003) (an individual detained on a misdemeanor charge may be strip searched as part of the booking process only if officers have reasonable suspicion that he is armed or carrying contraband); *Kelsey v. County of Schoharie*, 567 F.3d 54, 62 (2d Cir. 2009) (Fourth Amendment requires reasonable (Cont'd)

inmate was to be placed in general population (*See, Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1448 (9th Cir. 1991); *Archuleta*, 523 F.3d 1278; *Cottrell*, 994 F.2d 730) and some have focused on the crime with which the detainee was charged (*See, Wood*, 354 F.3d 57; *Weber*, 804 F.2d at 802; *Bull*, 539 F.3d at 1199). However, these considerations stray from the guidance given by this Court in *Bell*.

As previously stated, the *Bell* opinion recognized the crucial importance of institutional safety and security

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(Cont'd)
suspicion that misdemeanor detainee is concealing weapons or contraband before strip search may occur); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (the Fourth Amendment precludes officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (strip searching without a reasonable suspicion that arrestees were concealing contraband or weapons was unreasonable); *Jones v. Edwards*, 770 F.2d 739, 741-42 (8th Cir. 1985) (strip search of a detainee was held unconstitutional where officials had no reason to suspect detainee was concealing weapons or contraband on his person); *Bull v. City & County of San Francisco*, 539 F.3d 1193, 1199 (9th Cir. 2008) (policy of conducting blanket strip searches of detainees regardless of severity of charge and without reasonable suspicion held unconstitutional) (*rehearing en banc granted*, 558 F.3d 887 (9th Cir. 2009); *Archuleta v. Wagner*, 523 F.3d 1278, 1284 (10th Cir. 2008)(search of detainee who was never placed in general population was not justified when no reasonable suspicion existed that she was concealing weapons or contraband); *Hill v. Bogans*, 735 F.2d 391, 394-95 (10th Cir. 1984) (same); *Cottrell v. Kaysville City, Utah*, 994 F.2d 730, 734-35 (10th Cir. 1993) (same).

and concluded that even body cavity searches were warranted regardless of whether the detainee had been charged with wrongdoing. *Bell*, 441 U.S. at 524, 558. Although the Court did not evaluate the degree of security required for different locations in the jail, the Court placed great emphasis on the fact that jails, in general, are "fraught with serious security dangers" and that smuggling of dangerous items or substances into the jail was a significant, serious concern. *Bell*, 441 U.S. at 559-60. Thus, given the Court's focus on the importance of jail safety and its unwillingness to differentiate between different crimes (or even between detainees charged with a crime and those charged with no wrongdoing) or between different locations in the jail, the circuit courts' decisions based on these factors have wandered far from the Court's precedents.

Other courts have noticed the divergence from this Court's directives and have made attempts to realign with this Court's precedent. In *Powell*, 541 F.3d at 1298, the Eleventh Circuit examined the principles set out in *Bell* and upheld a policy of the Fulton County Jail requiring every person booked into the jail's general population to undergo a visual strip search, conducted without an individual determination of reasonable suspicion to justify the search and regardless of the crime with which the person was charged. *Id.* at 1300. The court in *Powell* was critical of the manner in which circuit courts had strayed from the decision in *Bell*.

In *Powell*, five of the eleven detainees who filed the lawsuit were strip searched without reasonable suspicion upon being booked into the facility. *Id.* at 1300. Four of those five had been arrested on minor charges

such as a traffic ticket warrant, a DUI charge, and a failure to pay child support charge.[3] *Id.* at 1301. The booking procedure in question required having an arrestee enter a large room with up to forty other inmates, remove all his clothing, place the clothing in boxes, take a group shower, and then submit to a visual inspection of the body while naked. *Powell* at 1301.

As the *Powell* court determined, the strip searches at issue in that case were less invasive than the body cavity searches involved in *Bell* and, as the court noted, the security interests which the Supreme Court had found to justify searching the body cavities of an inmate re-entering the jail in *Bell* were clearly no greater than those which justify searching an arrestee being initially booked into a jail. *Powell* at 1302. The *Powell* court further determined that, following the *Bell* opinion, the courts which had required reasonable suspicion prior to a strip search of a pretrial detainee had simply misapplied *Bell*. *Powell* at 1306-07. According to the Eleventh Circuit,

> [t]he *Bell* decision, correctly read, is inconsistent with the conclusion that the Fourth Amendment requires reasonable suspicion before an inmate entering or re-entering a detention facility may be subjected to a strip search that includes a body cavity inspection. And the decision certainly is inconsistent with the conclusion

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3. In *Powell*, the Eleventh Circuit remanded the proceedings to the district court for further factual development regarding the other groups of inmates.

> that reasonable suspicion is required for detention facility strip searches that do not involve body cavity inspections.

Powell at 1307.

As further support for its conclusion that the Supreme Court's *Bell* opinion did not require reasonable suspicion prior to subjecting inmates to the invasive body cavity searches evaluated in that case, the Eleventh Circuit pointed out the significance of Justice Powell's dissenting opinion in that case. As the *Powell* court noted, Justice Powell had dissented for one reason and one reason only – the Court had not required reasonable suspicion for the body cavity searches. *Id.* at 1307-08. In *Bell*, Justice Powell stated,

> I join the opinion of the Court except the discussion and holding with respect to body-cavity searches. In view of the serious intrusion on one's privacy occasioned by such a search, I think at least some level of cause, such as reasonable suspicion, should be required to justify the anal and genital searches described in this case.

Bell, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part). Therefore, Justice Powell understood the Court's opinion to mean that no reasonable suspicion was required even for the invasive body cavity searches that occurred in that case. Yet reasonable suspicion is precisely what the Tenth Circuit requires for any strip search, not just for a visual body cavity inspection.

The *Powell* court also found fault with certain opinions of the Fifth, Sixth, Seventh, and Ninth Circuits, which had drawn a distinction between arrestees charged with felonies and those charged with a lesser violation. As the *Powell* court stated,

> [I]n each . . . case, the court of appeals concludes that because the plaintiffs were "minor offenders who were not inherently dangerous," detention officials could conduct a strip search only where there was "a reasonable suspicion that the individual arrestee is carrying or concealing contraband. . . . Those decisions are wrong. The difference between felonies and misdemeanors or other lesser offenses is without constitutional significance when it comes to detention facility strip searches. It finds no basis in the *Bell* decision, in the reasoning of that decision, or in the real world of detention facilities.

Powell at 1309-10 (citations omitted).

The *Powell* court went on to stress that the need for strip searches is not exaggerated. *Id.* at 1310. Officials at a facility such as a county jail typically know very little about the new inmates being booked or the security risks they present. *Powell* at 1311. For example, any arrestee could potentially be a gang member who committed a lesser charge in an attempt to enter the jail and smuggle contraband to a fellow gang member. *Id.* Additionally, arrestees being booked into a facility typically have had a large degree of contact with

outsiders. *Powell* at 1313. Because of the risks inherent in operating such a facility, jail officials should "be accorded wide-ranging deference" in adopting policies to further facilitate order and security. *Powell* at 1311, *citing Bell*, 441 U.S. at 547.

As the *Powell* decision thoroughly explains, the circuit courts and lower courts have sharply diverged from the principles stated in *Bell* on multiple points. A split among the circuits as to the proper application of *Bell* has clearly emerged. As previously noted, several circuits have rendered decisions contradictory to *Bell* and *Powell* by requiring reasonable suspicion for a minimal strip search. (*See infra* n.2, pp. 8-9.) However, in a case with facts very similar to the facts of this case, the Seventh Circuit found that a strip search of a jail detainee was constitutional even though she was never placed in general population. *See, Stanley v. Henson*, 337 F.3d 961, 962, 966-67 (7th Cir. 2003) (upholding as constitutional a clothing-exchange procedure that requires inmates to disrobe in front of same-sex officers and put on jail-issued uniforms).

Florence v. Bd. of Chosen Freeholders of County of Burlington, 595 F. Supp. 2d 492 (D.N.J. 2009), *order amended by Florence v. Board of Chosen Freeholders of County of Burlington*, ___ F. Supp. 2d ___, 2009 WL 1971328 (D.N.J. June 30, 2009), further supports Saulsberry and James' arguments that the decisions in this area have strayed from the holding in *Bell* and that a split exists as to its proper application. In *Florence*,

the Defendants requested the court certify the following question for interlocutory appeal:

> [W]hether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment. . . .

Florence, 2009 WL 1971328 at *5.

One of the factors the Defendants had to establish for certification was that "substantial grounds for difference of opinion" existed regarding the resolution of the law. *Id.* at *3. On June 30, 2009, the district court granted the motion certifying the order for interlocutory appeal to the Third Circuit. *Id.* at *2-*5. In its opinion, the court discussed the recent decisions among the district and circuit courts and noted the decisive split regarding the resolution of the Fourth Amendment law, namely the proper application of this Court's opinion in *Bell*. Based on this, the court concluded that substantial grounds existed for difference of opinion as to whether the Fourth Amendment required reasonable suspicion to conduct a search at a jail facility and, if so, under what circumstances. *Id.* at *3-*4.

Likewise, in *Bull*, 558 F.3d at 887, the Ninth Circuit issued an order on February 20, 2009, granting an en banc rehearing of *Bull*, 539 F.3d 1193. As stated *infra* n.2, pp. 8-9, *Bull*, 539 F.3d at 1193, found a policy of conducting blanket strip searches of detainees

regardless of the severity of the charge and without reasonable suspicion to be unconstitutional. *Bull*, 539 F.3d at 1199. In a concurring opinion, Circuit Judge Ikuta stated,

> I concur in the majority's opinion [finding the blanket strip searches without reasonable suspicion to be unconstitutional] with reluctance and grave concern. While compelled by Ninth Circuit case law, the disposition is in tension with Supreme Court precedent. Moreover, by disregarding the jail administrators' urgent concerns about a serious contraband smuggling problem, I agree with the dissent that we are potentially putting lives in the San Francisco detention system at risk.

Bull, 539 F.3d at 1202 (Ikuta, J., concurring). Judge Ikuta went on to describe how the Ninth Circuit had strayed from principles this Court established in *Bell*. *Bull*, 539 F.3d at 1202-05 (Ikuta, J., concurring). Noting that, in the *Bell* opinion, this Court had dictated that courts must accord "wide-ranging deference" to the judgment of detention facility administrators regarding order and security and, further, this Court considered that detention centers are "fraught with serious security dangers" and rejected any requirement for evidence to support a suspicion that detainees had smuggled contraband into the facility. *Bull*, 539 F.3d at 1202-03 (Ikuta, J., concurring). As previously stated, a rehearing of that case has been granted. *Bull*, 558 F.3d at 887.

Based on the acknowledged split among the circuit courts regarding this issue and their divergence from the principles in *Bell*, the conclusion must be that the law regarding the constitutionality of strip searching arrestees being booked into a facility is cloudy and far from resolved. Furthermore, to the extent that the precedents in this circuit have required reasonable suspicion, have considered the arrestee's charge or reason for detention, or have considered whether the search occurred pursuant to the booking process, these considerations deviated from the principles stated in *Bell*. *Bell* required neither probable cause nor reasonable suspicion prior to subjecting inmates to a visual inspection of body cavities. *Bell*, 441 U.S. at 558-59. Thus, this case presents an excellent opportunity for this Court to revisit the issue and resolve the confusion.

II. THE LAW REGARDING STRIP SEARCHES OF PRETRIAL DETAINEES WAS NOT CLEARLY ESTABLISHED AT THE TIME THE STRIP SEARCH OCCURRED IN THIS CASE.

In *Pearson v. Callahan*, __ U.S. __, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009), this Court reiterated its longstanding doctrine of qualified immunity protecting government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson*, 129 S. Ct. at 815, *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of

law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 129 S. Ct. at 815, *citing Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (Kennedy, J., dissenting) (further citations omitted). An official is entitled to qualified immunity where clearly established law does not show that his actions violated constitutional rights. *See, Pearson*, 129 S. Ct. at 816. The qualified immunity inquiry turns on the objective legal reasonableness of the action, evaluated in light of the law which was clearly established at the time it was taken. *Wilson v. Layne*, 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999). The defense of qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

In *Pearson*, this Court stressed the importance of the "clearly established" factor of qualified immunity. The principles of qualified immunity shield an officer from personal liability when an official reasonably believes that his or her conduct complies with the law because, as the Supreme Court stated, officials are "entitled to rely on existing lower court cases without facing personal liability for their actions." *Pearson*, 129 S. Ct. at 823.

Where a divergence exists among the circuits and/or lower courts on the interpretation of the law relevant to the lawsuit, the law cannot be described as "clearly established." Officials are justified in relying upon current cases without exposing themselves to liability. *Pearson*, 129 S. Ct. at 823. For the analysis in this case,

Bell remains valid and binding law. *See, Powell* at 1302. According to this Court, "[i]f judges thus disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy." *Pearson*, 129 S. Ct. at 823, *citing Wilson*, 526 U.S. at 618.

Based on the opinions which have issued from this Court and from the circuits, it is indisputable that the law surrounding the constitutionality of visual strip searches of pretrial detainees being booked into a jail is anything but clearly established. In *Serna v. Goodno*, 567 F.3d 944 (8th Cir. 2009), the Eighth Circuit recently recognized that *Powell* "at a minimum" highlights the fact that whether the law requires reasonable suspicion for strip searches of detainees is unclear. *See, Serna* at 95-51 (finding that, although this Court did not expressly articulate a standard, "some unarticulated level of individualized suspicion" must have been present in *Bell*). While the parties may disagree on whether *Bell* did indeed require some standard of suspicion, the fact that a federal appellate court can only describe the standard as existing only at "some unarticulated level" mandates a finding that the law on this issue is not clearly established. This Court has repeatedly held that officers are entitled to qualified immunity if their actions do not violate clearly established law. To deny an officer this immunity and hold him liable under a standard courts cannot articulate is directly contrary to the doctrine of qualified immunity.

Furthermore, the fact that a rehearing and the interlocutory appeal were granted in *Florence* for the express purpose of reconsidering the strip search issue

in light of the acknowledged lack of clarity in the law on strip searches, coupled with the fact that a rehearing was also granted in *Bull* for the same purpose, further supports Saulsberry and James' argument that the issue is far from "clearly established." If such a vast discrepancy exists in courts' interpretations of the status of the law surrounding strip searches of detainees, a jail staff member cannot be held responsible for choosing which court precedent to follow. Jailers cannot be expected to be on notice that conducting a visual strip search – as Myers alleges in the instant case – violates clearly established law. *See, Pearson*, 129 S. Ct. at 823, *citing Wilson*, 526 U.S. at 618.

III. BECAUSE THE LAW APPLICABLE TO THIS CASE WAS FAR FROM "CLEARLY ESTABLISHED" AND BECAUSE SAULSBERRY AND JAMES' ACTIONS COMPLIED WITH THIS COURT'S PRECEDENT IN *BELL*, SAULSBERRY AND JAMES ARE ENTITLED TO QUALIFIED IMMUNITY.

Based on the principles stated in *Bell*, no constitutional violation even occurred in this case. As this Court concluded in *Bell*, no constitutional violation occurred because the "significant and legitimate security interests" justifying the very invasive body cavity searches outweighed the privacy interests of the inmates. *Bell*, 441 U.S. at 559-60. Here, Myers did not allege that a search of her body cavities, such as the very invasive search that was upheld as constitutional in *Bell*, occurred. She alleged only that she was required to disrobe and shower and that a "visual" search of her person – not an invasive body cavity search as occurred

in *Bell* – was performed. If the much more invasive searches in *Bell* were justified under the Fourth Amendment based on safety and security concerns, the search Myers alleges occurred clearly was justified based on those same concerns.

The search Myers alleges occurred in this case was much less invasive than the searches in *Bell* and *Powell*. In *Bell*, the detention facility conducted visual body-cavity searches of all inmates, including pretrial detainees, following contact visits. In that case, all inmates (regardless of the reason for their detention) were required to expose their body cavities for visual inspection as part of the strip search conducted after every contact visit. *Bell*, 441 U.S. at 558. However, as this Court concluded, given the overwhelming safety and security reasons for the searches, the very invasive visual inspection of body cavities absent probable cause was not unreasonable pursuant to the Fourth Amendment. *Bell*, 441 U.S. at 558-60. Likewise, in *Powell*, the Eleventh Circuit upheld a Fulton County Jail policy requiring every person booked into the jail's general population to enter a large room with up to forty other inmates, remove all his clothing, place the clothing in boxes, take a group shower, and then submit to a visual inspection of the body while naked. *Powell* at 1301. In this case, even based on Myers' allegations, the search of her person was conducted privately. Her allegation is that she was "visually searched," but no "body search" occurred. Myers conceded that James, a female employee, was the only officer present, and it has been established there was no evidence that any other individual viewed the search. In *Bell*, the visual body cavity searches were upheld as constitutional even

though "because of time pressures, this humiliating spectacle [was] frequently conducted in the presence of other inmates." *Bell*, 441 U.S. at 577 (Marshall, J., dissenting). Thus, the search to which Myers alleges she was subjected was much less invasive and much more private than those in *Bell* and in *Powell*.

Furthermore, *all* pretrial detainees who had received contact visits in *Bell* were subjected to that very invasive body cavity search. *Bell*, 441 U.S. at 558. *See also, Powell*, 541 F.3d at 1301-02 (policy requiring every person booked into the general population to be subjected to a strip search conducted without an individual determination of reasonable suspicion regardless of the crime with which the person was charged was held to be constitutional). As the *Powell* court noted, the search policy upheld in *Bell* recognized that an inmate's entry or re-entry into the facility posed a strong opportunity for concealment of contraband and the searches should, therefore, be performed "when an inmate is processed into the facility for the first time, when an inmate returns from having any contact with the public, such as during a contact visit, and so on." *Powell* at 1308-09. Thus, the fact that all inmates who had received contact visits in *Bell* and all inmates being processed into the facility in *Powell* were subjected to the searches did not render the searches unconstitutional.

Here, the same concerns supporting the searches of inmates entering the facility existed, specifically, deterring the smuggling of weapons, drugs, and other contraband into the facility. Myers was being processed into the facility from the public, and the concerns the

Powell court noted were present. *Powell* at 1308-09. As this Court stated in *Bell*, "[p]rison administrators [. . .] should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgement are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547. Thus, based on the balancing of interests set forth in *Bell*, no constitutional violation even occurred in this case, and James is entitled to qualified immunity for her acts in performing the search of Myers on this basis alone.

Myers' allegations that James had her disrobe and shower and subjected her to a "visual" search and not a body cavity search involve actions far less invasive than the visual body cavity searches evaluated in *Bell*. As Justice Powell's dissent in *Bell* noted, the anal and genital searches described in that case constituted a "serious intrusion on one's privacy." *Bell*, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part).

Furthermore, Saulsberry was not even personally involved in the search of Myers and is entitled to qualified immunity. Personal participation is an essential element in a § 1983 claim, and a plaintiff's failure to establish that a government official was personally involved in violating her constitutional rights is fatal to her claim. *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir.1996). Because Myers did not and cannot demonstrate Saulsberry's participation in the relevant events, she did not and cannot demonstrate that he violated clearly established law. Therefore, he is entitled

to qualified immunity from Myers' claims. *Pearson*, 129 S. Ct. at 815. Furthermore, even if Myers had demonstrated Saulsberry's involvement based on a failure to train jailer James regarding strip searches or based on the search policy, he still would be entitled to qualified immunity based on the fact that the policy complied with this Court's precedent and was constitutional. As Saulsberry and James demonstrated in the district court, James received substantial training which guided her to act in compliance with constitutional law and to act in accordance with the jail's procedures; these procedures upheld inmates' constitutional rights and did not violate clearly established law. Because Saulsberry and James demonstrated that the law regarding this type of search was far from clearly established and further demonstrated that James' actions did not violate clearly established law, both Saulsberry and James are entitled to qualified immunity.

CONCLUSION

In the years following this Court's decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), a split has developed among the circuits regarding the standard required to perform a strip search of a pretrial detainee being booked into a jail. This case presents an opportunity for this Court to remedy the dissension among the circuits regarding the standard required. Given the number of circuit court cases which have strayed from the principles stated in *Bell* and given the recent trend in courts realigning their decisions with *Bell*, it is not clearly established that the conduct of Petitioners, Travis Saulsberry and Loretta James even based on Respondent Lorri Myers' version of the facts, violated her rights. Therefore, the Tenth Circuit erred in determining that Petitioners Travis Saulsberry and Loretta James were not entitled to qualified immunity regarding the strip search of Respondent Lorri Myers, and the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA FILED JANUARY 12, 2009

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. CIV-07-223-FHS

LORRI MYERS,

Plaintiff,

v.

LEFLORE COUNTY DETENTION CENTER PUBLIC TRUST, COUNTY OF LEFLORE, LORETTA JAMES, in her individual and official capacity, and TRAVIS SAULSBERRY, in his individual and official capacity,

Defendants.

OPINION AND ORDER

Lorri Myers ("Myers") brings this civil rights action pursuant to the authority of 42 U.S.C. § 1983 claiming her constitutional rights were violated during the early morning hours of September 1, 2006, in connection with her nearly four-hour incarceration in the Leflore County Detention Center ("LCDC") on a charge of public intoxication. Myers contends her Fourth Amendment right to be free from unreasonable seizures was violated

when her detention was continued even after her bond had been paid and the arresting entity, the Town of Pocola Police Department, had informed LCDC authorities that she could be released. Myers also contends she was subjected to a strip search at the LCDC in violation of the Fourth Amendment. Myers' final constitutional claim involves her contention that her Eighth and Fourteenth Amendment rights were violated in connection with the LCDC's nonconsensual and invasive booking procedures and by not being provided sufficient clothing and hygiene items during her incarceration. In addition to her constitutional claims, Myers asserts state law tort claims under the Oklahoma Governmental Tort Claims Act ("OGTCA"), 51 O.S. § 151 *et seq.* for negligent infliction of severe emotional distress, intentional infliction of severe emotional distress, negligent hiring and retention, and invasion of privacy. Myers has named as Defendants the Leflore County Detention Center Public Trust ("LCDC Public Trust"), the County of Leflore ("County"), Travis Saulsberry ("Saulsberry"), and Loretta James ("James"). Saulsberry was the Administrator of the LCDC at the time of this incident. James is a female LCDC detention officer, who was primarily responsible for the processing of Myers into the LCDC.

The Court has before it for its consideration the Motion for Summary Judgment by Saulsberry and James (Doc. No. 94) and the Motion for Summary Judgment by LCDC and the County (Doc. No. 95).

Appendix A

SUMMARY JUDGMENT STANDARDS

The standards relevant to the disposition of a case on summary judgment are well established. Having moved for summary judgment in their favor under Rule 56 of the Federal Rules of Civil Procedure, Defendants' initial burden is to show the absence of evidence to support Myers' claims. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). Defendants must identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which establish the absence of any genuine issue of material fact. *Universal Money Centers v. AT & T*, 22 F.3d 1527, 1529 (10th Cir.), *cert. denied*, 115 S.Ct. 655 (1994) (quoting Fed. R. Civ. P. 56(c)). Defendants' need not negate Myers' claims or disprove her evidence, but rather, their burden is to show that there is no evidence in the record to support her claims. *Celotex*, 477 U.S. at 325. Myers, as the nonmoving party, must go beyond the pleadings and "must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which [she] carries the burden of proof." *Applied Genetics v. First Affiliated Securities*, 912 F.2d 1238, 1241 (10th Cir. 1990).

Summary judgment is not appropriate if there exists a genuine material factual issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986). "A fact is 'material' only if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the non-

moving party.'" *Thomas v. IBM*, 48 F.3d 478, 486 (10th Cir. 1995) (quoting *Anderson*, 477 U.S. at 248). In this regard, the court examines the factual record and reasonable inferences therefrom in the light most favorable to Myers. *Deepwater Invs. Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991). This court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

FACTUAL BACKGROUND

Late in the evening on August 31, 2006, the pickup truck in which Myers and her husband, Ronald Myers, were riding was stopped by Town of Pocola police officer, Terry Gouker ("Gouker"), at a traffic checkpoint. After the stop, Ronald Myers, who was the driver of the vehicle, was ordered out of the vehicle and he was administered field sobriety tests by Gouker. After completing the tests, Ronald Myers was handcuffed and placed under arrest for driving under the influence. During the course of the ensuing search of the pickup truck, Myers was ordered out of the vehicle by Gouker. Field sobriety tests were likewise administered to Myers and she was handcuffed and placed under arrest for public intoxication.[1] Gouker then transported both

1. In her brief, Myers references her Second Amended Complaint and disputes that she was ever given field sobriety tests. She contends she was only given orders concerning such tests-not that she performed them. A review of the Second (Cont'd)

Myers and her husband to the LCDC for processing on their respective charges.

Myers arrived at the LCDC for booking at 12:52 a.m. on the morning of September 1, 2006. Myers was taken to the booking area and asked numerous health, medical, and biographical questions as set forth in the LCDC Medical and Biographical Information Form (Doc. No. 94, Exhibit No. 9). In response to these questions, Myers acknowledged that she had consumed four liquor drinks in the previous twenty-four hours. At the conclusion of this questioning, Myers was given a property sheet to sign to verify her property and she was escorted by James to the search and shower room, which was connected to the booking area by a door. James told Myers to remove her clothes so that they could be searched. James was the only individual with Myers in the search and shower room at this time. Myers removed her clothes in James' presence and was visually searched by James, but no body cavity search was conducted. James testified in her deposition that she performed a strip search of this sort for all bookings into LCDC. Doc. No. 107, Exhibit G, p. 60, lines 1-15. James gave Myers a towel, shampoo, jail clothes, and she was told to shower. Myers requested a tampon, but none were available, and James provided Myers with a maxi pad and boxer

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(Cont'd)

Amended Complaint does not support Myers version, however, as she states that "[a]fter [she] was out of the pickup, she was ordered to perform certain field sobriety tests by the defendant Officer. After [she] complied with the defendant Officer's order, [she] was placed under arrest and was handcuffed." Second Amended Complaint, ¶¶ 31 and 32.

shorts. James told Myers to get dressed in her jail clothes after showering and that she, James, would be monitoring Myers through the door to the booking area, which Myers contends was left open. Myers contends that while showering she could see James in the booking area if she positioned herself towards the right part of the shower, but also, that she couldn't be seen by James if she positioned herself towards the corner of the shower. During the course of her shower, Myers contends she saw a male inmate sweeping the floor in the booking area and that he walked by the door at least two times. Myers is not sure if this male inmate saw her in the shower room or even if he looked in the shower room.[2] After Myers showered and changed into her jail

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2. James has no independent recollection of the events surrounding the booking of Myers on September 1, 2006. To counter Myers' version of the events, James, Saulsberry, and Betty Harris, the current LCDC Administrator, testified in their depositions as to the typical procedures followed when booking and processing a female arrestee such as Myers, including the operation of the automatic locking solid door to the search and shower room. Defendants argue the door had to be propped open to remain open and that James would not have done so. Defendants also make reference to the configuration of the booking area and search and shower room, including the presence of a separate door to the shower portion of the search and shower room, to argue that it is impossible for someone in the shower to be seen from the booking area. On summary judgment, the Court is obligated to review the factual record in the light most favorable to Myers; consequently, while Defendants' version of these factual issues is noted, the Court recognizes the factual dispute presented by the record and it recites Myers' version for purposes of analyzing the summary judgment motions.

clothes, she was taken to the detoxification cell. At 1:23 a.m. on September 1, 2006, the LCDC received a fax transmission from the Town of Pocola Police Department stating "[c]oncerning prisoner Lori Myers has paid in full please release her from your custody." Myers remained in the detoxification cell until she was released at 4:50 a.m. on September 1, 2006,—just shy of four hours from the time she arrived at LCDC for booking.

FOUR-HOUR DETENTION RULE

Myers contends her Fourth Amendment[3] right to be free from unreasonable detention was violated by being detained for nearly four hours. Myers contends the length of her detention was unreasonable given that the Pocola Police Department notified the LCDC at 1:23 a.m. on September 1, 2006, that Myers' bond had been paid and that she could be released.

It is undisputed that Myers was detained in the LCDC pursuant to an unwritten LCDC policy of detaining individuals arrested for intoxication for four hours before they are eligible to be released. In isolation, this policy clearly does not violate the Fourth Amendment's prohibition against unreasonable seizures as a brief period of detention following an arrest for intoxication is permissible given that "the state . . . has an interest in protecting the public from the intoxicated

3. The Fourth Amendment is made applicable to the states through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 650 (1961).

and the intoxicated from themselves." *Anaya v. Crossroads Managed Care Sys.*, 195 F.3d 584, 591 (10th Cir. 1999). Myers, however, contends that the application of any such fixed-hour rule imposes upon the institutional authority the obligation to determine whether it has probable cause to believe the arrestee is a danger to herself or to others. In this regard, Myers contends that once the Pocola Police Department faxed the information about Myers making bond and her husband arrived to take her home[4], the LCDC was obligated to release her and the failure to do so equates with an unreasonable seizure within the meaning of the Fourth Amendment. The Court disagrees.

Myers relies on two cases in support of this argument- *Anaya* and *McConney v. City of Houston*, 863 F.2d 1180 (5th Cir.1989). In *Anaya*, the plaintiffs were seized by the police, transported to an alcohol detox center, and detained. The Tenth Circuit determined that "to justify seizure for intoxication for alcohol, an officer must have probable cause to believe an intoxicated person is a danger to himself or others." *Anaya*, 195 F.3d at 591. Myers argues that the undisputed testimony is that she was not intoxicated and that probable cause did not exist to support the arrest and subsequent detention. This argument, however, is an attempt to divert the focus from the knowledge of the LCDC officials in connection with the detention of Myers to

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4. Although not clear from the record, Myers' husband apparently passed a breathalyzer test at the LCDC and was released shortly after being brought into the LCDC.

the knowledge of the Gouker in making the arrest for public intoxication. As a detention facility accepting arrestees from the Town of Pocola Police Department, the LCDC and its employees are not responsible for the arrest of Myers or the probable cause determination made by Gouker, the arresting officer. The LCDC is entitled to rely on the probable cause determination made by the arresting officer when Myers was accepted into its facility for detention. *See Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1180 (10th Cir. 2003) (nurses and medical personnel assisting police are entitled to rely on the probable cause determinations of law enforcement officers when performing a warrantless and coerced blood test). Thus, with respect to the actions and accountability of LCDC officials, the Court concludes that *Anaya* does not impose an independent determination of probable cause for Myers' arrest and that James was entitled to rely on the probable cause determination made by the Gouker.[5]

Myers contends that even assuming James could rely on Gouker's determination of probable cause to

5. The Court notes that in *Anaya* the Tenth Circuit rejected the argument of the detention facility that "[s]ince there was probable cause for the criminal arrests . . . there was probable cause for the detention to detox." *Anaya*, 195 F.3d at 591. This statement is not a renunciation of the rule that detention facility employees are entitled to rely on the probable cause determinations made by an arresting officer. This statement was made in the context of arrests on charges *other than* those related to alcohol and the Tenth Circuit concluded that "[a] legitimate-though-unrelated criminal arrest does not itself give probable cause to detain the arrestee to detox." *Id.* at 592.

arrest for public intoxication, *McConney* dictates that James could not continue to rely on that determination after the fax was received from the Pocola Police Department. McConney, a diabetic, was arrested for public intoxication after officers found him in a rain-filled ditch in Houston, Texas. McConney was conscious, but had slurred speech and failed to respond to questioning. McConney was taken to the city jail and detained pursuant to a similar four-hour detention policy[6] even though there was evidence that McConney informed jail medical personnel that he was having an insulin reaction, that he told the booking officer he was not drunk, that he tried to make bail with money in his possession, and, most significantly, that the booking officer told McConney that he knew McConney was sober, but that the four-hour rule prevented him from releasing McConney. *McConney*, 863 F.2d at 1183. In addressing the issue of the "reassessment" of probable cause during an arrestee's detention, the Fifth Circuit held:

> We conclude that a person may constitutionally be detained for at least four or five hours following a lawful warrantless arrest for public intoxication without the responsible officers having any affirmative duty during that time to inquire further as to whether the person is intoxicated, even if requested to do so. However, once a

6. McConney spent thirty to forty-five minutes in a holding cell and about seven or eight hours in a regular cell. *McConney*, 863 F.2d at 1183.

> responsible officer actually does ascertain beyond a reasonable doubt that one who has been arrested is in fact not intoxicated, the arrestee should be released. This rule strikes the proper balance as it prevents the officer responsible from willfully continuing detention of one so arrested who the officer has now actually ascertained beyond reasonable doubt is not intoxicated, without requiring the officer to reassess the initial probable cause finding at every change in circumstances or protestation of the arrestee.

(footnote omitted). *Id.* at 1185. The rule set forth by the Fifth Circuit in *McConney*, however, does not assist Myers as the evidence in this case does not establish that James ever ascertained, beyond a reasonable doubt or otherwise, that Myers was not intoxicated. In this regard, the relevant evidence establishes that Gouker made a determination that there was probable cause to support an arrest on a charge of public intoxication and that Myers admitted during the booking procedure that she had consumed four alcoholic drinks within the preceding twenty-four hours. Thus, there was never any determination made by James that Myers was not intoxicated and James' enforcement of the LCDC's four-hour rule did not violate Myers' Fourth Amendment right to be free from unreasonable detention.

Appendix A

BOOKING PROCEDURES, HYGIENE, CLOTHING, AND SHOWER VIEWING

Myers contends her Eighth and Fourteenth Amendment rights were violated when she was not provided proper feminine hygiene products and clothing to control her menstrual discharge, when she was asked personal and medical questions in the presence of a male inmate during the booking process, and when she was exposed to a male inmate while she was naked in the shower. The Court finds that no constitutional violations are implicated by these allegations.

As a pretrial detainee, Myers was entitled to constitutional protection with respect to the conditions under which she was being held. Such a claim has its genesis in the Fourteenth Amendment's guarantee of substantive due process. *See Hare v. City of Corinth*, 74 F.3d 633, 639 (5th Cir. 1996). This claim, however, is analyzed under the Eighth Amendment's "deliberate indifference" standard, which is made applicable to the states through the Fourteenth Amendment. *See Barney v. Pulsipher*, 143 F.3d 1299, 1310 n. 10 (10th Cir. 1998); *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996). In this context, "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Two elements must be established to sustain a claim related to jail conditions or inmate safety: First, a pretrial detainee must show that (1) the condition complained of was sufficiently serious to implicate constitutional protection and (2) that

the jail official was deliberately indifferent to the detainee's health or safety. *Reynolds v. Powell*, 370 F.3d 1028, 1031 (10th Cir. 2004). A sufficiently serious jail condition is one which exposes a detainee to "a substantial risk of serious harm." *Id.* Such conditions may be harsh and restrictive without violating constitutional rights, *Barney*, 143 F.3d at 1311, and the relevant inquiry involves a review of the "circumstances, nature, and duration" of the conditions with "the length of exposure to the conditions . . . of prime importance." *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001). The jail official's state of mind is measured by a subjective standard, rather than an objective one. That is, the jail official must "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

The Court's application of these standards to Myers' allegations with respect to feminine hygiene products, clothing, and the questioning during the LCDC booking procedure results in a finding that such allegations are not sufficiently serious to implicate Myers' constitutional rights. While James' failure to provide Myers with her desired choice of a tampon and panties to control her menstrual discharge during her four-hour stay at LCDC certainly may have caused Myers some discomfort, even embarrassment, it did not expose her to a "substantial risk of serious harm." Likewise, while the intake procedure of asking questions in the booking area where other individuals may have been present, including other detainees being processed, may not be the

optimum procedure to follow when processing arrestees, there is no evidence that such procedure exposed Myers to a substantial risk of harm sufficient to implicate constitutional protection. Finally, with respect to the allegation that she was exposed to an inmate while she was naked in the shower, the Court concludes the evidence does not establish any viewing, much less a regular viewing, by inmates sufficient to establish a constitutional violation in this context. In fact, Myers testified that she is not sure if the male inmate who was sweeping the floor in the booking area ever saw her in the shower room or if he even looked in the shower room. Moreover, Myers testified that if she positioned herself a certain way in the shower that she could not be seen by anyone in the booking area. Under these factual circumstances, the Court concludes no constitutional violation has been established with respect to Myers' claim that she was viewed naked in the shower by another inmate. *See Hayes v. Marriott*, 70 F.3d 1144, 1147 (10th Cir. 1995) (an analysis of the "frequency with which prison guards watch inmates of the opposite sex undressing, using toilet facilities, and showering is an important factor in assessing the constitutionality of prison practices," although a prisoner's right to privacy may be violated by a single search under certain circumstances). Consequently, Myers' constitutional claims related to the booking procedures, feminine hygiene products, clothing, and shower viewing are subject to summary adjudication in favor of Defendants.

Appendix A

STRIP SEARCH

Myers contends James performed a strip search in violation of the Fourth Amendment when James required her to remove her clothes in the search and shower room in James' presence as part of the routine booking procedures of the LCDC. In response, James argues that Myers was not subjected to a "full strip search," but rather that she "was required only to disrobe and shower and her clothes were searched." Doc. No. 122, pp. 6-7. From this statement and the relevant portion of James' deposition testimony[7], the Court understands James to be arguing that Myers was not visually searched by her, but that Myers was required to remove her clothes *outside the view of James* and that Myers' *clothes* were then searched

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7. In her deposition, James testified that the normal procedure is for her to escort the arrestee to the shower, the arrestee steps into the shower, and she "asks them to please remove their clothes . . . and [she] search[es] their clothes as they're being taken off and put into our bag." Doc. No. 107, Exhibit G, p. 45, lines 2-4. James also testified in general terms as to the LCDC's strip search policy:

> Q: When are you required to perform a strip search of a female inmate at the Detention Center?
>
> A: At all bookings.
>
> Q: Strip search. Do you know what a strip search is? What is a strip search, to your knowledge?
>
> A: Take their clothes off and search them.

Doc. No. 107, Exhibit G, p. 60, lines 10-15.

without James ever viewing her naked body. These different factual scenarios preclude resolution of Myers' Fourth Amendment claim in connection with the strip search. There are genuine issues of fact as to whether Myers was subjected to a strip search or, simply, whether she was asked to undress in the shower, *outside the view of James*, with her clothes then searched after Myers passed them out to James. If no strip search occurred, Defendants would clearly be entitled to judgment in their favor. On the other hand, if a strip search took place as testified to by Myers, the analysis set forth by Tenth Circuit case law, particularly *Archuleta v. Wagner*, 523 F.3d 1278 (10th Cir. 2008) and *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984), would govern the propriety of any such strip search. *See also Draper v. Walsh*, 790 F. Supp. 1553 (W.D. Okla. 1991). That analysis, however, must await a resolution of the underlying issue of whether a strip search of Myers took place. The Court therefore finds that genuine issues of fact preclude the issuance of summary judgment on the grounds alleged by Defendants in connection with the strip search claim. The Court likewise finds that genuine issues of fact preclude summary judgment on the strip search claim with respect to Saulsberry and the LCDC Public Trust as there remain unresolved factual issues concerning supervisory and governing-body liability.

James and Saulsberry also assert an entitlement to summary judgment on the basis of qualified immunity. The affirmative defense of qualified immunity is available

to all government officials.[8] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This is an immunity from suit and not merely a defense to liability. *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 644-45 (10th Cir. 1988) and *England v. Hendricks*, 880 F.2d 281 (10th Cir. 1989), *cert. denied*, 493 U.S. 1078 (1990). The test the Court must apply is an objective one which inquires into the objective reasonableness of the official's actions. *Harlow*, 457 U.S. at 816. Government officials performing discretionary functions will not be held liable for their conduct unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818; *see also Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997) (quoting *Harlow*). As the Court has held there are genuine issues of fact as to whether a strip search occurred, this qualified immunity argument must

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8. Myers argues that James and Saulsberry are not entitled to assert qualified immunity because they are private employees. The Court disagrees. James and Saulsberry are employees of the LCDC Public Trust, an entity created pursuant to Oklahoma public trust law, 60 O.S. § 176 *et seq.* The LCDC was formed to operate the LeFlore County jail facility with the County as the beneficiary. The LCDC Public Trust is an entity which performs a public function, the operation of a jail facility, and it is invested with powers associated with those exercised by governmental entities, such as the right of eminent domain. 60 O.S. § 176(I). Consequently, it is the Court's opinion that James and Saulsberry, as employees of this public trust, are entitled to assert the defense of qualified immunity. *See Beedle v. Wilson*, 422 F.3d 1059, 1065 (10th Cir. 2005) (a hospital, created as a public trust under 60 O.S. § 176 *et seq.*, is a governmental entity for purposes of section 1983).

likewise fail at this stage of the litigation due to these unresolved factual issues.

LIABILITY OF THE COUNTY AND THE LCDC PUBLIC TRUST

Myers seeks to impose liability on the County and the LCDC Public Trust by bringing suit against Saulsberry in his official capacity as Jail Administrator and by directly bringing suit against these two entities.[9] Myers' official capacity suit is an attempt to hold the County and the LCDC Public Trust accountable for the alleged constitutional deprivation. The County argues that it is not a proper party to this action as the LCDC Public Trust is the entity responsible for the day-to-day operations of the LCDC.[10] The Court agrees. As of July 6, 2004, the LCDC Public Trust took control of the LeFlore County jail facility and it has operated the LCDC since that time pursuant to its creation as a public trust under a Trust Indenture and Oklahoma law.

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9. Myers concedes that she is not suing James in her official capacity.

10. The County also contends it has not been properly named as Oklahoma law requires that in any suit against a county the proper method for bringing suit is to name the "Board of County Commissioners" of that county as the defendant. 19 O.S. § 4. Myers has filed a Motion to Substitute or Join Party to cure this deficiency. Doc. No. 104. Because the Court finds the LCDC Public Trust is the proper governing-body defendant, and not the County, the motion to substitute or join is futile. The Court has denied Myers' Motion to Substitute or Join Party by separate minute order of this date.

See Doc. No. 95, Exhibits 6 and 7. Consequently, the appropriate governing body against which suit can be brought is the LCDC Public Trust.

STATE LAW CLAIMS

Myers asserts state law claims for negligent and intentional infliction of severe emotional distress, negligent hiring and retention of employees, and invasion of privacy. As a "political subdivision" pursuant to section 152(d) of the OGTCA, the LCDC Public Trust is exempt from tort liability for such claims. Section 155(24) of the OGTCA provides that "[t]he state or a political subdivision shall not be liable if a loss or claim results from . . . [p]rovision, equipping, operation or maintenance of an prison, jail or correctional facility." As Myers' remaining claim related to the alleged strip search clearly involves the operation of the LCDC by the LCDC Public Trust, a "political subdivision" under the OGTCA, the immunity from suit provided by section 152(24) operates in favor of the LCDC Public Trust and bars such state law claims against it.

Likewise, the state law claims against James and Saulsberry are barred. Under the OGTCA, political subdivision employees such as James and Saulsberry are entitled to immunity for torts committed within the scope of their employment. 51 O.S. § 153B and 163C. Under 51 O.S. § 152(9), "scope of employment" is defined as "performance by an employee acting in good faith within the duties of his office or employment or of tasks lawfully assigned by a competent authority. . . ." Actions

outside the scope of one's employment are those which are malicious or taken in bad faith. *Pellegrino v. State ex rel. Cameron University*, 63 P.3d 535, 537 (Okla. 2003). Here, although Myers asserts that James and Saulsberry acted with "gross negligence" and outside the scope of their employment, she fails to support this allegation with any evidence to suggest, much less establish, that James and Saulsberry were acting other than in compliance with detention facility procedures regarding the alleged strip search. The good faith performance of these tasks by James and Saulsberry as part of their employment with the LCDC Public Trust insulates them from liability for the state law claims under the OGTCA notwithstanding the fact that it may ultimately be determined that any such strip search is constitutionally deficient.

PUNITIVE DAMAGES

Myers claims she is entitled to punitive damages against James, Saulsberry, and the LCDC Public Trust on her remaining section 1983 claim related to the alleged strip search. As to the LCDC Public Trust, it is clear that as a governing body it is immune from punitive damages under 42 U.S.C. § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 27 (1981). As to James and Saulsberry, they would be subject to punitive damages if it can shown that their conduct "is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. § 30, 56 (1983). No such evidence has been presented by Myers;

consequently, the request for punitive damages against James and Saulsberry on Myers' section 1983 claim related to the strip search must fail.

CONCLUSION

Based on the foregoing reasons, the Motion for Summary Judgment (Doc. No. 94) filed by James and Saulsberry is granted in all respects, with the exception of Myers' Fourth Amendment claim related to the alleged strip search. The Motion for Summary Judgment (Doc. No. 95) filed by the County and the LCDC Public Trust is granted in its entirety as to the County and is granted in all respects as to the LCDC Public Trust, with the exception of Myers' Fourth Amendment claim related to the alleged strip search.

It is so ordered this 12th day of January, 2009.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JULY 16, 2009

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 09-7001

LORRI MYERS,

Plaintiff-Appellee,

v.

LORETTA JAMES; TRAVIS SAULSBERRY, in their individual and official capacities,

Defendants-Appellants,

and

LEFLORE COUNTY DETENTION CENTER PUBLIC TRUST; COUNTY OF LEFLORE,

Defendants.

ORDER AND JUDGMENT*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

Appendix B

Before **HARTZ**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **TYMKOVICH**, Circuit Judge.

Loretta James and Travis Saulsberry appeal from the district court's order denying them qualified immunity with regard to Lorri Myers' 42 U.S.C. § 1983 claim alleging she was strip searched at the LeFlore County Detention Center (LCDC). Because this circuit's law concerning strip searches was clearly established at the time of the search, we affirm the district court's decision.

Background

Late on August 31, 2006, Ms. Myers and her husband were stopped at a traffic checkpoint. Mr. Myers (the driver) was transported to the LCDC but was released after he passed a breath test. Ms. Myers was arrested for public intoxication and was processed into the LCDC early in the morning of September 1. Appellant James is the detention officer who processed Ms. Myers. Appellant Saulsberry was the LCDC Jail Administrator from July through December 2006.

As part of the booking process, Officer James escorted Ms. Myers into the shower room and issued her jail clothes. According to Ms. Myers, Officer James required Ms. Myers to remove all of her civilian clothes and visually inspected Ms. Myers' naked body, though she did not perform a body cavity search. Ms. Myers was required to shower and dress in the jail clothes.

She was placed in a detox cell until her four-hour wait period[1] had elapsed, then she was released on bail.

Mr. and Ms. Myers brought suit under § 1983 and state law, challenging their arrests and Ms. Myers' detention at the LCDC. The only issue in this limited interlocutory appeal concerns Ms. Myers' § 1983 claim that the strip search violated her Fourth and Fourteenth Amendment rights. With regard to this claim, the district court noted that the defendants disputed Ms. Myers' account of the search. Accordingly, the court held that genuine issues of material fact precluded the entry of summary judgment in favor of appellants. Appellants then filed this interlocutory appeal challenging this denial of qualified immunity.

Jurisdiction

We first must satisfy ourselves that we have jurisdiction to hear this appeal. *See Johnson v. Martin*, 195 F.3d 1208, 1213 (10th Cir.1999). Ms. Myers argues that we lack jurisdiction because the district court held that there were genuine issues of material fact precluding summary judgment. This court has recognized, however, that in the qualified immunity context, "even though a district court concludes that there are controverted factual issues, a summary judgment ruling may still be immediately appealable in

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1. LCDC's policy is to hold allegedly intoxicated persons for at least four hours, even if they appear sober and they post bail sooner. Ms. Myers' challenge to that policy is not at issue in this appeal.

certain circumstances." *Id.* at 1214. "In particular, if a defendant's appeal of the denial of a motion for summary judgment is based on the argument that, even under the plaintiff's version of the facts, the defendant did not violate clearly established law, then the district court's summary judgment ruling is immediately appealable." *Id.* "In that circumstance ... a qualified immunity appeal raises the kind of abstract legal issues that are separate from the factual issues that may arise at trial." *Id.* On appeal, appellants do argue that under Ms. Myers' version of the facts, their conduct did not violate clearly established law. Accordingly, we have jurisdiction. *See id.* at 1215.

Analysis

"We review the denial of qualified immunity de novo." *Archuleta v. Wagner*, 523 F.3d 1278, 1282 (10th Cir.2008). Given our jurisdictional limitations, our review is based solely on Ms. Myers' version of the facts.

A. Strip Search

"The doctrine of qualified immunity protects public officials performing discretionary functions unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Johnson*, 195 F.3d at 1216 (quotation omitted). "Furthermore, the law must be clearly established at the time the alleged illegal conduct occurred." *Warner v. Grand County*, 57 F.3d 962, 964 (10th Cir.1995). Appellants argue that on September 1,

2006, it was not clearly established that in these circumstances, the type of strip search Ms. Myers describes would be unconstitutional. Appellants' argument has no merit.

"For the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must be as plaintiff maintains ." *Foote v. Spiegel*, 118 F.3d 1416, 1424 (10th Cir.1997). In the last two decades, this court has issued several decisions regarding strip searches of detainees. "We have articulated two primary concerns in determining whether a strip search is reasonable for the purposes of the Fourth Amendment: whether a detainee is to be placed in the general prison population and whether there is reasonable suspicion that the detainee has concealed weapons, drugs, or contraband." *Archuleta*, 523 F.3d at 1284. In this case, the undisputed fact is that Ms. Myers was never placed in the general prison population, even briefly. And nothing in the record indicates a basis for a reasonable suspicion that she was carrying weapons, drugs, or contraband on her person, or that Officer James actually had any such suspicion.

It was clearly established in this circuit well before September 1, 2006, that "a detainee who is not placed in the general prison population cannot be strip searched if the searching officer does not *at least* have reasonable suspicion that the detainee possesses concealed weapons, drugs, or contraband." *Id.* at 1286 (addressing status of the law as of April 2005). Several

of this court's opinions have condemned strip searches in circumstances similar to this case. *See id.* at 1284-87 (denying qualified immunity for strip search of woman booked for domestic violence); *Foote*, 118 F.3d at 1425 (denying qualified immunity for May 1994 strip search of woman booked for driving under the influence of marijuana); *Warner*, 57 F.3d at 964 (stating that on January 24, 1991, "it was clearly established in this circuit that a brief intermingling with the general jail population does not justify a strip search absent reasonable suspicion of drugs or contraband"); *Cottrell v. Kaysville City*, 994 F.2d 730, 734 (10th Cir.1993) (per curiam) (stating, in case involving woman arrested for driving under the influence in July 1991, "[w]e fail to see how this particular search, if it happened, could be considered reasonable as a matter of law"); *Chapman v. Nichols*, 989 F.2d 393, 395-98 (10th Cir.1993) (holding that private strip searches of women arrested for minor traffic violations between fall 1991 and spring 1992 were unconstitutional, and stating that "no objectively reasonable person would believe that a strip search of a minor offense detainee would be constitutional simply because the search did not involve a more obtrusive viewing of the detainee's naked body"); *Hill v. Bogans*, 735 F.2d 391, 394-95 (10th Cir.1984) (holding unconstitutional a strip search of a detainee charged only with an outstanding warrant for a traffic offense, who was only briefly intermingled with the prison population).

Relying on *Powell v. Barrett*, 541 F.3d 1298 (11th Cir.2008) (en banc), appellants contend that this circuit's precedent misapplies *Bell v. Wolfish*, 441 U.S. 520 (1979), and that therefore the search was constitutional. We are

unpersuaded. This court's opinions remain binding in this circuit until the Supreme Court or the en banc circuit court overrules them, *see In re Smith*, 10 F.3d 723, 724 (10th Cir.1993) (per curiam), and the cases discussed above have not been overruled. A decision handed down in another circuit, two years after the events at issue in this case, does not undermine our conclusion that this circuit's law was clearly established in September 2006.

B. Saulsberry's Liability

Mr. Saulsberry argues that Ms. Myers has failed to prove that he had any personal participation in the strip search and that her failure to prove such personal participation is fatal to her § 1983 claim. But it appears that the theories of liability Ms. Myers has asserted against Mr. Saulsberry do not rely on his personal participation in the search, but instead allege he is responsible for an unconstitutional practice and procedure at the LCDC and for failure to train. *See* Aplt.App. at 214, 217 (Ms. Myers' summary judgment response brief); *see also id.* at 413 (district court opinion finding "there remain unresolved factual issues concerning supervisory . . . liability"). Mr. Saulsberry does not address these theories in appellants' opening brief, so we need not consider them at this time. *Resolution Trust Corp. v. Fed. Sav. & Loan Ins. Corp.*, 25 F.3d 1493, 1506-07 (10th Cir.1994) ("Generally, issues not pursued in the brief-in-chief are deemed abandoned and waived.").

Appendix B

Conclusion

The judgment of the district court is AFFIRMED.

Entered for the Court

Wade Brorby
Senior Circuit Judge